

**The Honorable Karen A. Overstreet
Chapter 11**

Hearing Date: December 6, 2013
Hearing Time: 9:30 AM
Location: Courtroom 7206
Response Date: November 27, 2013

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, AT SEATTLE**

In re:

NATURAL MOLECULAR TESTING
CORPORATION,

Debtor.

No. 13-19298-KAO

**THE DEBTOR'S REPLY IN SUPPORT
OF ITS MOTION FOR ORDER
AUTHORIZING THE EXTENSION
OF STAY AS TO THE OFFICERS OF
THE DEBTOR**

I. INTRODUCTION

Natural Molecular Testing Corporation, the debtor-in-possession (the "Debtor" or "Natural Molecular"), by and through its counsel, HACKER & WILLIG, INC., P.S., respectfully submits this Reply in support of its motion for an order authorizing the extension of the automatic stay to any action against the Debtor's officers and principals for a period of no less than 180 days following the filing of the petition herein. [Dkt. #32]

II. EVIDENCE RELIED UPON

This Reply is supported by the prior filed Declaration of Keith Tyacke (the "Tyacke Decl.") [Dkt. # 33], and by the pleadings and files on record herein.

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III. REPLY

The Official Unsecured Creditors' Committee (the "Committee") objected to the Motion in late-filed briefing,¹ raising arguments that may be categorized generally as the Motion is "too early," "too broad," and that the Committee "needs more information." While the Debtor may agree to certain modifications of its proposed Order on the Motion, the Debtor is entitled to the relief requested. The Committee cannot at this time raise "claims" not yet available to it.²

A. All Pending State Court Litigation Should Be Stayed.

The Committee does not appear to object to extension of the stay of the two lawsuits pending against Beau Fessenden, the Debtor's President and CEO: the *Genetic Pathways* litigation and the *GenMark* litigation. *See*, prior filed Tyacke Decl., ¶¶ 4-5 [Dkt. #33]. Thus, that aspect of the Motion should be granted.³

B. The Committee is Unable to Raise Any Claims at this Time.

The Committee's request is premature. This bankruptcy case has been pending for less than six weeks, and, during that time and prior, the Debtor has diligently been evaluating its options and pursuing funds to allow it to pay creditors. Currently, the Debtor believes it will ultimately be able to pay all allowed unsecured claims in full from collection of its accounts receivable.

Before raising the "insider claims" contemplated in its objection, the Committee must first provide notice and an opportunity to object, and request the Court's permission to bring such claims. This would only be available to the Committee in the event the Debtor chose to

¹ Indeed, a request for appointment of counsel has not yet been filed.

² There is no urgency whatsoever with the Committee's objection/request here as there is no evidence of any kind to raise any "concern" that Mr. Fessenden is "disposing of, or hiding, assets." *See*, Objection, pg. 3.

³ The Debtor shortly will be removing all pending litigation against the Debtor and/or Mr. Fessenden to this Bankruptcy Court, which will amount to seven (7) new adversary proceedings.

1 forego them.

2 The touchstone principle under the Code is that the right to pursue claims on behalf of
3 a bankruptcy estate rests with the debtor. *See*, 11 U.S.C. § 1107. The debtor-in-possession
4 holds these powers “in trust for the benefit of the creditors.” *In re Martin Custom Made Tires*
5 *Corp.*, 108 F.2d 172, 173 (2d Cir. 1939). Pursuant to the Code’s reorganization scheme, it is
6 within the debtor-in-possession’s discretion to sue for the avoidance of a preference under 11
7 U.S.C. § 547, or for the avoidance of a fraudulent transfer as defined by 11 U.S.C. § 548.
8 Thus, primary responsibility to collect the assets of the estate is given to the debtor-in-
9 possession in order “to avoid confusion and a multiplicity of actions, and to expeditiously
10 settle bankrupt estates[.]” *Gochenour v. Cleveland Terminals Bldg. Co.*, 118 F.2d 89, 95 (6th Cir.
11 1941).

12 The Code provides disparate forms of possible relief to creditors in cases where a
13 debtor-in-possession breaches its statutory duties, the applicable relief here being that the
14 creditors may petition the Court to compel the debtor-in-possession to act, or may petition the
15 Court for leave to bring suit in the debtor’s name and on behalf of all creditors. *See, In re*
16 *Monsour Medical Center*, 5 B.R. 715, 718 (Bankr. W.D. Pa. 1980) (emphasis added); *see, e.g.*,
17 *Trimble v. Woodhead*, 102 U.S. 647, 26 L. Ed. 290 (1880); *Gochenour*, 118 F.2d at 92-93; *Chatfield*
18 *v. O’Dwyer*, 101 Fed. 797 (8th Cir. 1901); and *Casey v. Baker*, 212 Fed. 247 (S.D. N.Y. 1914).

19 Importantly, a debtor’s failure to bring suit must be unjustifiable before a creditors’

20 committee will be permitted to act in its stead; express authority for a creditors’

21 committee to bring suit is not found in the Bankruptcy Code. *Monsour*, 5 B.R. at 717.

22 Creditors may be authorized to act, but only with the Court’s consent, where the Debtor has
23 unjustifiably failed to act, and where the creditor’s desired act is “the most appropriate form
24 of creditor protection under the circumstances.” *See, Monsour*, 5 B.R. at 719 (emphasis added).

25 A debtor’s decision whether to pursue such claims is subject to judicial review at the
26 elevated standard of “abuse of discretion.” *See, Monsour*, 5 B.R. at 718. This judicial

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1 intervention is crucial, for resolution of the conflict between the creditor and the debtor
2 requires a balancing of the competing interests to determine whether or not the debtor's
3 failure to bring the action is unjustifiable and therefore constitutes an abuse of discretion. *See,*
4 *In re Toledo Equipment Co., Inc.*, 35 B.R. 315, 319 (N. Ohio 1983). At such a hearing, the court
5 can determine if the initiation of such an action at that time would forward the reorganization
6 effort, or to the contrary, might be a detriment. *In re Curry & Sorensen*, 57 B.R. 824, 828
7 (B.A.P. 9th Cir. Cal. 1986). And, in every such instance, a motion is required.

8 Here, the Committee has filed no such motion and may not substitute its own
9 judgment for the Debtor, absent the required showing and a Court order.

10 **C. The Debtor Was Solvent; Claims Will Be Paid.**

11 Without discussing this issue in great length, the facts will show that the Debtor was
12 solvent at the time any and all distributions were made to Mr. Fessenden, and that all such
13 distributions were in the ordinary course of the Debtor's ongoing business operation as a
14 Subchapter S Corporation.

15 Further, the Debtor fully expects that the large scheduled accounts receivable and
16 suspended Medicare payments will be collected, and that properly submitted and allowed
17 unsecured claims will be paid in full during the course of this bankruptcy case. That said,
18 many of the Debtor's largest creditors' claims are highly disputable in amount, and are in fact
19 disputed. *See*, Petition [Dkt. #1]. This includes certain creditors on the Committee, whose
20 objective seems to be to see the Debtor's business fail.

21 Also, it is quite premature to assess possible future claims against the Debtor's officers
22 at this time, and, as stated herein, the Committee does not properly hold any such claims. It
23 would be more prudent for the Committee to investigate such claims during the course of the
24 requested 180-day period, and for the Court and the Debtor to review the initial scope and
25 posture of the seven cases that are to be removed to this Bankruptcy Court.

26 As for the Committee's arguments regarding the meeting of creditors, Mr. Tyacke, who

1 as Chief Financial Officer is best placed to testify as to the finances of the Debtor, answered
2 all questions put to him for approximately two hours regarding the Debtor's finances. At the
3 request of the U.S. Trustee's Office, Mr. Fessenden will be appearing on January 7, 2014, at
4 the continued 341 Meeting to give additional testimony. Notably, the Committee did not even
5 request the continuance of the 341 Meeting.

6 Further action against Mr. Fessenden or other of the Debtor's principals should be
7 stayed for a period of 180 days following the Petition Date, with extension of such stay as to
8 the Debtor's principals beyond this initial period by further Order of the Court.⁴ That said,
9 given the Committee's objection, the Debtor's prior proposed Order may be revised as
10 follows:

- 11 • The extension of the automatic stay shall terminate upon the dismissal of this
12 bankruptcy case, and may be modified upon further Order of the Court, upon motion by the
13 Committee, after notice and an opportunity to object; and
- 14 • The following individuals are to be covered by the extension of the automatic
15 stay: Beau Fessenden, President and CEO; Keith Tyacke, CFO; Chris Jacob, current General
16 Counsel; Kenneth Webert, Vice President; Rob Rovig, former National Sales Director; Mark
17 Haley, former Executive Vice President; Ken Wallace, former Director of Business
18 Development and Marketing; Karthikeshwar Kasirajan, former Chief Medical Officer; and
19 Nicholas Gunn, former General Counsel.

20 IV. CONCLUSION & REVISED PROPOSED ORDER

21 Therefore, the Debtor respectfully requests that the Court enter an order authorizing
22 extension of the stay to the Debtor's officers. A revised proposed Order consistent with the
23 foregoing is attached hereto as Exhibit A.

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25 ⁴ This 180-day period is reasonable given the two-year statute of limitations stated in 11 U.S.C. § 546(a)(1).
26

1 DATED this 3rd day of December, 2013.

2 Respectfully submitted,

3 HACKER & WILLIG, INC., P.S.

4
5 /s/ Charles L. Butler, III

6 Arnold M. Willig, WSBA #20104

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9 Attorneys for the Debtor
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